

May 27, 1998

**AGREEMENT BETWEEN
U.S. ENVIRONMENTAL PROTECTION AGENCY, REGION 4
AND TENNESSEE DEPARTMENT OF ENVIRONMENT AND CONSERVATION
DIVISION OF WATER POLLUTION CONTROL
REGARDING THE IMPLEMENTATION OF
SECTION 303(d) OF THE CLEAN WATER ACT**

WHEREAS, Clean Water Act ("CWA") § 303(d), 33 U.S.C. § 1313(d), provides for: (i) identification of waters for which applicable technology-based effluent limitations and other controls are not stringent enough to implement water quality standards; (ii) the establishment of a priority ranking for water quality limited segments ("WQLSs"); and (iii) establishment of total maximum daily loads ("TMDLs") as necessary for pollutants for which those WQLSs are not in attainment with water quality standards;

WHEREAS, the U.S. Environmental Protection Agency, Region 4 ("EPA") and the Tennessee Department of Environment and Conservation, Division of Water Pollution Control ("Tennessee") desire to restore the quality of impaired waters to achieve water quality standards, in accordance with § 303(d) of the CWA, thereby removing waters from the list of WQLSs not meeting water quality standards;

WHEREAS, EPA acknowledges the ongoing efforts being undertaken by Tennessee to implement CWA § 303(d), 33 U.S.C. § 1313(d);

WHEREAS, Tennessee has the lead responsibility for the designation of WQLSs and the establishment of TMDLs pursuant to § 303(d) of the CWA, and its implementing regulations;

WHEREAS, Tennessee submitted its draft 1998 303(d) list on April 1, 1998, to EPA, and the Tennessee 1998 303(d) list contains impaired segments where the appropriate TMDLs, or other pollution control requirements pursuant to 40 C.F.R.130.7, have and will be developed; and

WHEREAS, EPA and Tennessee now desire to set forth their understanding of the commitments they have made to each other concerning their joint efforts to implement CWA § 303(d).

NOW, THEREFORE, EPA AND TENNESSEE HAVE PREPARED THIS AGREEMENT AS FOLLOWS:

I. Tennessee's TMDL Approach

A. Tennessee has developed a watershed-based water quality management approach. As part of the watershed planning process, activities within the Tennessee Division of Water Pollution Control, including permitting, monitoring, modeling, TMDL development/implementation and water quality assessment are coordinated and integrated by watershed for each of the 54 watersheds within the state.

Watershed-based management allows the state to examine each watershed in detail and to determine the interaction between the upstream and downstream point and non-point pollutant sources. As such, more effective TMDLs and other pollution control requirements can be developed across the state.

B. Each watershed plan will have a chapter devoted to the establishment of TMDLs and other pollution control requirements, including an implementation plan for that particular watershed. Tennessee will submit a copy of the watershed plan and any additional

documentation such as modeling reports to EPA according to the watershed plan schedule. In addition, where numeric TMDLs have been developed, a TMDL index will be submitted which outlines the following: a summary of the water quality issues; the modeling approach; the TMDL, including the wasteload allocation, load allocation, and margin of safety; dates of public meetings and a summary of public comments received on the TMDL.

C. The Tennessee 1998 303(d) list contains clear priorities for TMDLs and other pollution control requirements based on the use support rating (i.e., degree of impairment), the water body's classification (i.e., uses to be made of the water body), the ecological importance of the water body, available resources, adequate instream monitoring data, available technical tools, and the degree of public interest.

D. Also in its 1998 303(d) list, Tennessee has categorized the water bodies as point source impacted, non-point source impacted, or blends of the two. The TMDL schedule agreed upon in Paragraph II. A., below will contain similar categorizations in order to provide estimated timelines for actual TMDL development.

E. Each water body that has a priority rating of 'high' for TMDL development will be addressed during the first watershed cycle. In each watershed cycle both the TMDL and other pollution control requirements will be addressed, including implementation issues. During the second watershed cycle, any available updated information on each impaired water body will be reviewed to determine if the water body still belongs on the 1998 303 (d) list. During the second 5-year basin cycle, TMDLs for all WQLSs from the FY 98 303 (d) list will be completed.

II. TMDLs for WQLSs on the 1998 CWA 303(d) List

A. EPA and Tennessee agree to the schedule set forth in Attachment 1 ("the Schedule"), the terms of which are incorporated by reference into this AGREEMENT, for Tennessee to establish numeric TMDLs or to develop pollution control requirements for the WQLSs identified on the 1998 303(d) list or the then-current 303(d) list, subject to Paragraph B below.

B. EPA and Tennessee understand that there is no obligation to submit numeric TMDLs for any WQLSs which either (a) are determined consistent with § 303(d) of the CWA and its implementing regulations, including 40 C.F.R. § 130.7(b)(1) not to need TMDLs; or (b) are on Tennessee's 1998 § 303(d) list but, consistent with the provisions of the CWA and its implementing regulations, are removed in accordance with any applicable law or regulation from a subsequent EPA-approved § 303(d) list for Tennessee. Waters can be removed from the 303(d) list for reasons including, but not limited to: (1) more recent or accurate monitoring data indicates that the water has attained compliance with the applicable water quality standards for the identified pollutants of concern; (2) more sophisticated water quality modeling indicates that the water is not a water quality limited segment for the identified pollutant(s) of concern; (3) flaws to the original analysis that led to the water being listed are identified; or (4) other pollution control requirements are developed for the water and pollutant(s) of concern leading to attainment of WQSs in two years.

C. Tennessee agrees, in accordance with the Schedule, to:

1. analyze all impaired waters in the state and initially determine for which waterbodies numeric TMDLs or other pollution control requirements are appropriate;
2. appropriately categorize the impaired waters in the state by reference to their impacts from point sources, non-point sources or blends of the two, and amend the

WQLS identified on the § 303(d) list accordingly;

3. take one or more of the following TMDL actions: i) establish a numeric TMDL; (ii) establish watershed-based pollution control requirements; or (iii) otherwise determine consistent with paragraph B. above that there is no TMDL obligation necessary.

D. EPA and Tennessee agree that any such TMDLs on the Schedule may be established on a watershed-wide basis in accordance with applicable regulations and guidance.

E. EPA and Tennessee understand that Tennessee has primary responsibility for the development of TMDLs on the Schedule.

F. By June 1st of each year, Tennessee will notify EPA of the TMDL actions that have been taken and will be taken during that calendar year.

G. If EPA believes that Tennessee may not meet the final deadline in the Schedule, or if EPA believes that Tennessee may not meet any other deadlines set in the Schedule, Tennessee agrees to consult with EPA. If after consultation, based on information available, EPA believes that Tennessee may not meet the final deadline in the Schedule for establishing TMDLs for WQLSs identified on the 1998 § 303(d)list, EPA agrees to take any steps necessary: (a) to ensure completion of the TMDLs at issue by the final deadline in the Schedule either through establishment of TMDLs or approval of any subsequently submitted TMDLs; or (b) to determine that TMDLs are not necessary for the WQLSs consistent with Paragraph II B. above.

H. Should it become necessary for EPA to take action under the provisions of II.G., Tennessee agrees that it will use its best efforts to help EPA establish TMDLs according to the Schedule. Moreover, Tennessee agrees that it will provide any existing and readily available data to assist EPA in establishing TMDLs at EPA's request.

I. EPA and Tennessee agree that in the event Tennessee submits a TMDL to EPA that EPA disapproves, the agencies will make a good faith effort to resolve the differences.

J. EPA and Tennessee agree that Tennessee will develop TMDLs in accordance with (1) Tennessee's Waste Load Allocation Agreement with EPA, where appropriate, which is incorporated by reference into this AGREEMENT as [Attachment 2](#), and any modifications to that memorandum that are mutually agreed upon by EPA and Tennessee; (2) site specific water quality models developed to address specific management questions, or (3) other scientific sources mutually agreed upon.

III. Funding

A. Tennessee maintains that in order for Tennessee to establish the TMDLs or other pollution control requirements according to the Schedule, Tennessee requires funds in the range of \$400,000 to \$500,000 annually, in addition to grant funding provided under § 106 of the CWA.

B. EPA agrees in good faith to make the Agency's best effort -- consistent with EPA's need to fund other programs and activities as appropriate -- to provide Tennessee with sufficient funds to meet the resource needs for this effort which might consist of additional new funds, flexibility in the use of existing federal funds or a combination of the two.

C. Tennessee recognizes that EPA's "best efforts" is not a guarantee that new funds will be provided. If EPA is not able to provide sufficient funds in each annual period for the development of TMDLs by Tennessee, EPA and Tennessee agree to meet and confer over a reasonable period of time, which is to be determined, to explore other options prior to

any assumption by EPA of TMDL activities and responsibilities now being done by Tennessee.

IV. Reports

Tennessee agrees to provide EPA with a written report of its progress toward completion of the commitments contained in this AGREEMENT, including but not limited to, identification of TMDLs submitted during the previous calendar year beginning December 31, 2000 and by December 31 of each year thereafter until the last TMDL action is taken on the Schedule.

V. Legal Effect

A. This AGREEMENT creates no cause of action against EPA or Tennessee beyond those, if any, that may already exist under state or federal law. In addition, the execution and implementation of this AGREEMENT does not constitute an explicit or implicit agreement by either EPA or Tennessee to subject itself to the jurisdiction of any federal or state court. Nor shall this AGREEMENT be construed as an admission by Tennessee or EPA that either failed to implement the provisions of CWA § 303(d). Nor shall this AGREEMENT be construed as creating any right or benefit, substantive or procedural, enforceable in law or in equity, by any person or entity against EPA or Tennessee. This AGREEMENT shall not create any right to judicial review involving the compliance or noncompliance with this AGREEMENT.

B. Nothing in this AGREEMENT shall be construed to require actions by EPA or Tennessee which are inconsistent with local, state, or federal laws or regulations or any court order.

VI. Force Majeure

A. EPA and Tennessee recognize that the performance of this AGREEMENT is subject to the fiscal and procurement laws and regulations of Tennessee and the United States, which include, but are not limited to, the Anti-Deficiency Act, 31 U.S.C. § 1341, et seq.

B. The possibility exists that circumstances outside the reasonable control of Tennessee or EPA could delay compliance with the Schedule. Such situations include, but are not limited to, sufficient funds not being appropriated as requested, appropriated funds not being available for expenditure, Congressional or legislative action or significant regulatory action affecting EPA's or Tennessee's commitments under this AGREEMENT, or catastrophic environmental events requiring an immediate and/or time-consuming response by Tennessee or EPA. Should a delay occur due to such circumstances, any resulting failure to meet the timetables set forth in the Schedule shall not constitute a failure to comply with the terms of this AGREEMENT, and any deadlines so affected shall be extended one day for each day of the delay.

C. EPA and Tennessee will provide each other with reasonable notice in the event that either EPA or Tennessee invokes this term of the AGREEMENT.

VII. Termination

This AGREEMENT, and all obligations arising hereunder, shall remain in effect until the last TMDL action is taken on the Schedule.

VIII. Modification

A. EPA and Tennessee understand that, while the commitments made under this

AGREEMENT are based on the best available projections of future funding, such projections may prove to be inaccurate, and the AGREEMENT will have to be modified accordingly.

B. EPA and Tennessee understand that the commitments made in this AGREEMENT are based on the statutes and regulations currently in effect and that changes to such laws or regulations may allow or require that the AGREEMENT be modified accordingly.

C. EPA and Tennessee understand that Tennessee may, as part of its ongoing watershed planning cycle, acquire updated new information that will add impaired waters to its 303 (d) list. EPA understands that if these waters are deemed "high priority" by Tennessee these newly listed waters may be assigned a higher priority than a water currently listed on the 1998 303(d) list. In the event that Tennessee is unable to meet the final deadline in the Schedule because of the number of new "high priority" waters found, this AGREEMENT may be modified by extending the final deadline in the Schedule up to 3 years. Pursuant to Paragraph II. G., if after consultation with Tennessee, EPA believes Tennessee may not meet this modified final deadline in the Schedule, EPA will ensure completion of the TMDLs by the final deadline.

D. EPA and Tennessee understand that this AGREEMENT may be modified only by their agreement.

DATED this 27th day of May, 1998

United States Environmental Protection Agency
By: John H. Hankinson, Jr.
Regional Administrator, Region 4

The State of Tennessee
Department of Environment and Conservation
By: Milton H. Hamilton Jr., Commissioner

ATTACHMENT

Schedule of TMDL development for waters on the 303(d) list

Group	By Year	# of High Priority TMDLs	By Year	# of Low Priority TMDLs
Group 1	2000	14	2005	47
Group 2	2001	19	2006	42
Group 3	2002	12	2007	34
Group 4	2003	7	2008	46
Group 5	2004	18	2009	44